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IN THE

Supreme Court of the United States

October Term, 1992

IRENE ROBBINS AND BERT SHEPHERD, TRUSTEES OF THE DAVIS ROBBINS FAMILY TRUST, AND THE DAVIS ROBBINS MARITAL TRUST, PETITIONERS,

VS.

PAINEWEBBER INCORPORATED, JOHN DAY, JERRY PAYNE, DAVID EAST AND DAVID ARNOLD, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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RECENT DEVELOPMENTS

Judgment having been rendered August 17, 1992 below, Trustees have moved to set it aside under FRCP 60(b) on grounds of new evidence and defendants' fraud. A new witness has testified since the arbitration to the Alabama Securities Commission, Trustees and the Securities and Exchange Commission, that in his presence two of the defendants plotted the fraud in advance.[1]

"CERTWORTHINESS"

The case remains worthy of certiorari, for the importance of judicial review of party-sponsored arbitrations. In recent years the Court has removed many obstacles for a "privatization of justice" before such forums. There is little distinction between compulsory arbitration of broker-customer suits before brokers' organizations such as the NASD or the exchanges, and compulsory arbitration of (for example) products liability suits under auspices of the National Association of Manufacturers. Arbitration clauses would fit easily into agreements for the sale of a car, or hiring of an attorney, or the like - and doubtless already have been put there. There is as yet no requirement that the arbitration clause disclose that (as here) the defendants' association will choose the three arbitrators; one of them will be an industry representative whose firm is simultaneously subject to similar suits or claims, possibly being arbitrated before a defendant's employee;[2] the hearing will be held beyond any legally enforceable subpoena power, and defendants are free to engage attorneys to resist subpoenas to witnesses whose testimony might be harmful; no rules of evidence need be followed; for that matter,

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[1] Appendix A. Such a motion may also be inspired by the Brokers' ultimate criminal trial. PaineWebber states they were under indictment "[a]t the time of the arbitration hearing" (Brief, p. 15), implying they aren't now. Despite 20 petitions for writ of mandamus from PaineWebber's attorneys, they *are*.

[2] The securities brokerage industry is a small world. Arbitrator Johnson is an officer and founder of the firm, Interstate /Johnson Lane Corporation (of *Gilmer* fame). Defendant Payne, PaineWebber's branch manager at the time of the alleged crimes herein, has since been hired as Interstate/Johnson's branch manager for Wilmington, N. C. - fifth amendment pleas, indictments and NASD disciplinary charges notwithstanding. Interstate/Johnson itself was a defendant in several industry arbitrations while this arbitration was pending.

defendants need not even subject themselves to cross-examination; the proceeding is essentially secret (there being no right of public attendance); and the decision will be without any explanation. These are restrictions of true "Star Chamber" potential, absent judicial supervision.

Majority and dissenting members of the Court have consistently stated that, if arbitrations are not assumed at the outset to be unwilling to enforce the law, *judicial review would be sufficient to ensure that valid claims were duly observed.*[3] The remaining questions are the district court standards of that review, and the standard under which the court of appeals should in turn review the district court. These matters are worthy of certiorari.

"SETTING THE RECORD STRAIGHT"

Even before eliminating record misrepresentations, harsh facts remain. Two elderly Trustees under a will follow their broker (Day) to PaineWebber from Thomson McKinnon in November 1987. In December he begins buying options without naming the customer in advance. He charges options (mainly S&P 100 index options) to Trustees, without their ordering any options. He loses them an agreed $1,148,599.45 on the options, $1,100,328.23 on S&P 100's. Simultaneously, 17 straight times he sells S&P 100's at a profit the same day he buys them and allocates these profits to his and two other brokers' accounts, beating odds of some 130,000:1 against such good luck.

These charges and allocations are entered by the "wire operator" the same day, *after the fact* - after the profits have been taken (in the case of the Brokers), or the options have lost or broken even (in the case of Trustees). The days after their profit allocations, the Brokers have to come up with $30,000-$122,500 cashier's-check loans from Arnold's customers, to pay for their "buys" - loans which aggregated some $563,000, and which they immediately repaid with PaineWebber checks on their profits.

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[3] See Petition, pp. 19-23, citing *Wilko, Mitsubishi Motors, McMahon, Rodriguez de Quijas and Gilmer.*

Two senior branch brokers complain about Day first to branch manager Payne, then to a regional manager who orders a report to New York headquarters. By now Trustees are out over $1,000,000. Day goes to Brazil, then returns and resumes the same pattern of options buying and allocation (but with less consistent success for the Brokers). He continues despite two objecting letters from Trustees and their attorney's personal requests to Day and Payne that he stop.

In arbitration the since-indicted Brokers (already ruled by a federal judge to have waived the Fifth) refuse to testify. The arbitration panel awards $325,000, about 25% of the agreed losses. Federal and state securities statutes require an award of the full losses, plus interest and attorney's fees; RICO would require treble damages plus attorney's fees. A federal judge vacates the arbitration under the Federal Arbitration Act for refusal to hear evidence (in not letting Trustees question the brokers), and under this Court's *dicta* in *Wilko* for "manifest disregard of the law." The Eleventh Circuit reverses, purporting to adopt a new, split, *de novo* standard of review; and in its opinion it clearly describes another arbitration entirely.

The "Discretionary" Accounts. PaineWebber states that *"[t]he Petitioners had a history of short-term, speculative trading, at Thomson McKinnon, and authorized John Day, who was their broker at that firm to handle their accounts in that manner on a discretionary basis 'as long as [the Trusts] were making money.' ... They were satisfied with the way Day had managed their accounts at Thomson-McKinnon. ... While at PaineWebber, Day continued to handle the Petitioners' acccounts in essentially the same manner he had handled them at Thomson McKinnon - through short-term, discretionary trading."* (Brief, p. 3). Neither the Thomson McKinnon nor PaineWebber account agreements were discretionary, as PaineWebber well knows (Cl. Exhs. 5, 6, 11, 12). That Day presumed to treat them as though they were, *compounds* rather than excuses the offense.

Trustees' "Approval" of the Options. *"Bert Shepherd testified that, in early December 1987, he specifically authorized*

Day to 'bop in and out' of index options. ... With Shepherd's knowledge and approval, Day purchased over $600,000 worth of index options for the Petitioners during December 1987 alone." (Brief, p. 4). Not so. PaineWebber's own cross-examination brought out that Shepherd first was informed of the options and discussed them with Day in *late* December. At that time he forbade Day to buy any more S&P 100's. If one must reproduce the transcript to blow away such smoke, one can:

Q. But you had received option trades of Standard & Poor's 100s in the last week of December 1987?

A. Yes, and I spoke to John Day about these.

Q. And at the time you received these S & P 100s in the last week of December, you didn't tell John Day to stop doing S & P 100s, did you?

A. Yes, sir.

Q. You did tell him at that time?

A. I did. I told him not to buy any -- I couldn't understand the options. It was in December. They were smaller. And he tried to explain how well he knew options. So I said if you do anything on options, it has to be very small amounts of money and has to be connected with a corporation where you could make sense out of it, know what the option is and do not touch the S & P 100s.

Fig. 1 - Arbitration Transcript, pp. 1790-1791

The First Misrepresentations and Omissions. *"The Petition asserts that similar 'misrepresentations had begun as far back as December 1987 ... The testimony ... does not refer to any*

conversations prior to February 10, 1988." (Brief, pp. 8-9). This is inconsistent with the (false) assertion that Day and Shepherd discussed options in early December. At any rate, in the above late-December discussion Day misrepresented to Shepherd that the options he'd charged Trustees had made money, when they'd lost; that they had not expired, when they had; and that they'd been "rolled forward," when they hadn't (TR. 2093-2094, 2246, 2249).

Tape Recorded Misrepresentations and Omissions. *"[N]one of the alleged misrepresentations during the taped conversation related to the sale or purchase of a security. ... Bert Shepherd testified that by February 2, 1988 - over three weeks prior to the taped conversation - the Petitioners had already retained counsel, did not trust John Day, and did not rely on anything he told them."* (Brief, p. 9). Utterly untrue - Trustees first discussed the matter with counsel February 23, when he advised the February 24 taping (TR. 2107-2114). February 24 Day told Trustees his options had lost them $300,000, when it was over $1,000,000; the options still existed, when they had expired; and that Day and his other customers had suffered "tremendous loss" when they had profited almost without exception (TR. 2107-2114; Cl. Exh. 48) and omitted telling of late allocations or Brokers' profits. All relate to the options charged to Trustees.

	tact. So you have a appreciation in that area. On your option situation you short positions are on. They are still there. We just rolled them forward. What you physically stand at now is you have about $300,000.00 loss. That is where you stand.
Davis:	As of today.
John:	As of today. We have had no positions closed out.
Bert:	Or do we still have these calls?
John:	Yes Sir.
Bert:	Are they all running out in February?
John:	No Sir, you just roll them forward. And you have had

Fig. 2 - Cl. Exh. 48, pp. 1-2.

Davis: Have you gotten any word back from your other clients that you might have been buying options for? Have you gotten any word on how they feel?

John: Yeah, Davis that is a different scenario. For some of those guys I have done this for 10 years. Some of them a year. They are going to have a better grasp as to what they are and what they represent. Nobody is happy with a loss. Hell. I had a tremendous loss. But they have a better understanding the same ways do. yes, they are going to roll with it but they have a better understanding as to what things are. Their is no way Mr. Shepherd could have known. I am convinced of that. Their is no way he could have known.

Fig. 3 - Cl. Exh. 48, p. 7.

The "Lazy Wire Operator" Defense. *"PaineWebber wire operators testified that they treated allocation tickets as low-priority items ... ; that they did not process allocation tickets immediately upon receipt ...; and that nobody can determine when Day turned in his tickets based upon the times appearing on them."* (Brief, p. 5). Untrue - the wire operator was Patricia Thomas; PaineWebber engaged attorneys for her to refuse compliance with an arbitration subpoena. She had testified:

Q By the way, when allocation tickets were turned in, did you time stamp them and enter them promptly yourself?

A Yes, I did.

Q Did you ever sit on them, say, for hours at a stretch?

A No.

Q Or about how long did you sit on them, to the best of your recollection?

A I entered them as soon as I got them. I didn't make a practice of holding any tickets.

Fig. 4 - Patricia Thomas 4/28/90 Deposition, p. 24

Trustees' "Speculative" Investment Objectives. *"The account documents - including option agreements - signed by the Petitioners to open the PaineWebber accounts demonstrate that*

the Petitioners' investment objectives were speculative in nature" (Brief, p. 7). Of course they do - Day had Trustees sign them with the account objectives blank, then filled in speculative objectives himself back at the office:

Q. Do you see any investment objectives indicated on that option agreement?
A. Investment objectives, yes.
Q. Did you fill those in?
A. No, sir.
Q. Were they filled in when you signed it?
A. No, sir.
Q. Did your investment objectives at that time include speculation?
A. No, sir.
Q. Did anybody ask you at that time what your investment objectives were?
A. No, sir.

Fig. 5 - Arbitration Transcript, p. 2084

The Brokers' Refusals To Testify. *"[T]he arbitrators did allow the Petitioners to question the Brokers, and ... the Brokers did not make a 'blanket invocation' of their fifth amendment rights. ... [T]he facts of this case do not support the Petitioner's question of whether arbitrators may refuse to allow plaintiffs to question witnesses"* (Brief, pp. 16-17). But see below - the Brokers *did* take the "blanket fifth;" the arbitrators *did* allow it; they refused to refer the case back to court; and they refused to postpone for even two months until a then-set criminal trial:

ARBITRATOR LOGUE: The panel is going to allow the blanket fifth Amendment. The basis

Fig. 6 - Arbitration Transcript, p. 1060 (10/16/90)

MR. EUBANK: -- I move under Section 17 that the panel send the case back to federal court. People that have demanded arbitration I think have waived it by refusing to cooperate and answer questions. And I don't think it is a fit case for arbitration either in the extent of its detail or in the posture of the respondents.

(Brief pause.)

ARBITRATOR LOGUE: Denied.

Fig. 7 - Arbitration Transcript, p. 1061 (10/16/90)

MR. EUBANK: If I understand the Chair correctly I have nothing further to ask -- in other words, the Chair has ruled if he takes a blanket Fifth Amendment, he can be asked no further questions?

ARBITRATOR LOGUE: Correct.

MR. EUBANK: That being the case, I have no further questions.

Fig. 8 - Arbitration Transcript, p. 1065 (10/16/90)

first motion is that inasmuch as the depositions of Mr. Day, Mr. East and Mr. Arnold and Mr. Payne are now of record, we move that the panel reconsider its rulings that they need not take the stand and respond to questions on the grounds that in these depositions as the panel goes through them you will see that they have testified in great detail previously about virtually every transaction including the cashier's checks and deposits and trades in the various accounts involved in this case.

Fig. 9 - Arbitration Transcript, p. 1952 (12/7/90)

ARBITRATOR LOGUE: Motion is denied.

MR. EUBANK: We move for a postponement of the next session until after the February -- February what, Dalton? When is the trial set, criminal trial?

MR. WESMITH: 5th.

MR. EUBANK: February 5th criminal trial on the grounds it is undue burden to us not to have the testimony of the brokers available and that it may be available after that time.

ARBITRATOR LOGUE: Mr. Eubank, motion denied.

Fig. 10 - Arbitration Transcript, p. 1954 (12/7/90)

CONCLUSION

The Alabama Bar Association's president, in defending the American legal system, recently picked a poor comparison:

> "When Shiguru Kamogawa retired from a career in medical research two years ago, he dreamed of using his 50 million yen retirement payment - about $385,000 - to set up his own consulting company. Ten weeks after he entrusted it to Ark Securities Co., he says, his retirement money was almost gone. ... Today, Mr. Kamogawa, 67 years old, has a part-time job at low pay with few benefits ... Ark salesmen, he asserts, recklessly traded his account for commission income. ... Complaints of stockbroker 'churning' of client accounts is a fact of life wherever there are financial markets, but in Japan the plight of the victims is especially severe. In many countries, investors can recover all or most of their losses by taking legal action. In Japan, mores and legal roadblocks discourage victims ... Many foreigners, particularly Americans, admire Japan for avoiding a U.S.-style litigation explosion. Rarely mentioned is the difficulty Japanese have gaining redress for even blatant wrongdoing."[4]

Whatever Mr. Kamogawa's woes, presumably he will be allowed to try them before a forum bound to honor Japanese statutes and to cross-examine his defendants - more than can be said for Trustees, so far. This is why the district court vacated the arbitration; why its decision should be upheld; and why this Court should grant certiorari to define the standards of judicial review of party-sponsored arbitrations. If arbitration is to be workable, it must (like the courts) do justice and be seen to do justice.

September 11, 1992.

Respectfully submitted,

Robert B. Eubank

Robert B. Eubank

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[4] Clarence M. Small, Jr., "President's Page," *THE ALABAMA LAWYER*, September 1992, p. 300.